STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 4, 2014
v	No. 313795 Genesee Circuit Court
ALISHA MARIE HALL, Defendant-Appellant.	LC No. 12-031198-FC

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

Defendant Alisha Hall was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under age 13), on an aiding and abetting theory.[1] Her husband, Daniel Hall,[2] was convicted as the principal offender. Under MCL 750.520b(2)(b), a person convicted of CSC I is subject to a mandatory minimum prison term of 25 years. MCL 767.39 provides that for all crimes in Michigan, an aider and abettor is subject to the same sentence as the principle offender. In light of these two statutes, Alisha was sentenced to term of 25 years to 50 years in prison despite the fact that the sentencing guidelines provided for a minimum term of no more than 11 years, 3 months. Daniel was also sentenced to a term of 25 years to 50 years.

The investigation of this case began with a police sting operation to locate persons using the internet for purposes involving child sexual abuse or exploitation. Police, in the guise of someone interested in child pornography, came into internet contact with Daniel who made several incriminating statements. This led to issuance of a search warrant for the Halls' home. In a search of the computers found at the couple's home, the police discovered 13 images under Daniel's "user file" on a laptop computer that depicted Daniel and Alisha's 6-month-old daughter naked and in positions that exposed her genitals. One of these photos showed Daniel with his tongue touching the outer portion of the child's genitals. Such contact is sufficient

[1] Defendant was also convicted of child sexually abusive activity, MCL 750.145c(2), for which she was sentenced to a term of 75 months to 240 months.

[2] In the interest of clarity, defendant will be referred to as Alisha and her husband as Daniel.

under to constitute penetration for purposes of CSC I. *People v Legg*, 197 Mich App 131, 132-133; 494 NW2d 797 (1992).

Daniel and Alisha were tried together, but before separate juries. Daniel, testifying before both juries, testified that on several occasions during their marriage he had threatened Alisha with sexual violence and on one occasion had threatened her with a knife. He testified that Alisha did not want to take the pictures of their daughter and that he told her that if she did not, he would hurt both her and the baby. He also testified that if Alisha had had her way, she would not have had any part in the crimes.

After initially denying any involvement, Alisha eventually confessed to police that she had taken the photos at issue. The officers testified that she told them that she took the photos on Daniel's direction and offered various reasons ranging from psychological manipulation to outright physical threats by Daniel, including a threat to anally rape the child, as the reason she did so. She also told the officers that Daniel's father had kidnapped and raped two little girls and stabbed Daniel's mother and that she was afraid that Daniel would do the same thing to her and her daughter. A psychologist who evaluated Alisha at the Center for Forensic Psychiatry found her to be "quite passive" and expressed "concerns regarding the effects of deficits in her oral/langauge processing capabilities on aspects of her adjudicative competence," but concluded that she was competent to stand trial as she was "not incapable of understanding the nature and object of the proceedings against her or of assisting in her defense in a rational matter."

Alisha's jury was instructed on the five elements of a duress defense: (1) that she participated in the crime because she was threatened in a way that would lead a reasonable person to fear death or serious bodily harm; (2) that she actually feared death or serious bodily harm; (3) that she was under such fear at the time she acted; (4) that she committed the act to avoid the threatened harm; and (5) that the situation did not arise because of her own fault or negligence. *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997).

The jury sent a question to the court during deliberations asking if a psychological evaluation of Alisha had been performed. The court, with consent of the attorneys, advised the jury that they were to reach their verdict based on the evidence alone. Shortly thereafter, the jury returned a guilty verdict.

Alisha was sentenced to the statutorily mandated minimum term of 25 years. The sentencing guidelines were calculated at a minimum term of from 81 months to 135 months. She had no prior criminal record, but received 10 PRV points due to the simultaneous conviction of producing child pornography. Her only scored offense variable was OV 13, which was scored at 25 points for three or more crimes, based on the number of photographs. MCL 777.43(1)(c).

Alisha argues that legislatively imposed mandatory minimum sentences violate the separation of powers clause of the Michigan constitution, Const 1963, art 3, § 2, which provides:

> The powers of the government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

In *People v Meeks*, 92 Mich App 433; 285 NW2d 318 (1979), we upheld the two-year mandatory minimum for felony firearm against a separation of powers challenge. In *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976). our Supreme Court, by plurality vote,[3] rejected such a challenge to the mandatory sentence of life without parole for a felony murder conviction.[4]

However, there does not appear to have been a Michigan case of record in which this Court or the Supreme Court has considered whether a mandatory minimum can constitute a separation of powers violation where the defendant has been convicted as an aider and abettor. I would hold that it does.

"[T]he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal conduct." *Mullaney v Wilbur*, 421 US 684, 697-698; 95 S Ct 1881; 44 L Ed 2d 508 (1975), cited with approval by the Michigan Supreme Court in *People v Aaron*, 409 Mich 672, 711; 299 NW2d 304 (1980). In the overwhelming majority of cases, this principle is not inconsistent with MCL 767.39, which provides that a defendant convicted as an aider and abettor is subject to the same punishment as the principal offender. Typically, the trial court, with the assistance of the sentencing guidelines, may impose very different minimum terms to a principal as opposed to an aider and abettor and may significantly vary the latter's minimum term based upon her prior record and degree of individual culpability.

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[3] Plurality opinions of our Supreme Court are not binding precedent where "a majority of the justices failed to concur on the exact reasoning for the holding." *People v Scarborough*, 189 Mich App 341, 344; 471 NW2d 567 (1991).

[4] The majority relies on *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001) for the proposition that "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." In that case, the trial court departed upward from the legislative sentencing guidelines in issuing the defendant's minimum sentence. *Id*. at 435-436. The trial court disregarded the guidelines, believing that the Legislature's enactment of the sentencing guidelines impermissibly limited the scope of judicial discretion. *Id*. Our Supreme Court disagreed, finding that because Michigan's sentencing guidelines are indeterminate, the trial court still possessed sentencing discretion. *Id*. at 439-440. However, the Court's ruling was based on Const 1963, art 4, § 45, which provides:

> The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detrained under such circumstances.

A 25-year mandatory minimum is not an "indeterminate" sentence and, therefore, neither *Hegwood* nor Const 1963, art 4, § 45 are applicable to the instant case.

However, where the principal is guilty of a crime that carries a mandatory minimum term, the trial court cannot take into account the wide variations of culpability that aiders and abettors may exhibit.

A defendant's "sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). Such particularized determinations are properly reserved for the trial court, which has heard the evidence and reviewed the applicable sentencing information. Individualized sentences cannot feasibly or constitutionally be administered by the Legislature or the Executive. Indeed, the United States Supreme Court struck down portions of sentencing guidelines enacted by Congress because the guidelines were mandatory and impermissibly limited a trial court's sentencing discretion. *United States v Booker*, 543 US 220, 258-260; 125 S Ct 738; 160 L Ed 2d 621 (2005) (STEVENS, J.).

While the jury rejected Alisha's claim that she was not guilty by reason of duress, that does not mean that there were no circumstances that would have led the sentencing court to impose a term less than that given Daniel, i.e., 25 years. In addition, any lesser sentence would speak only to the minimum term. Her maximum term would remain 50 years and any discharge from prison before that time would only come with approval of the parole board.

It is clear that the mandatory minimum set by MCL 750.520b(2)(b) represents the Legislature's view that those guilty of CSC I against victims under age 13 should be severely punished and I agree that severe punishment is typically proper. However, the question is whether it is proper in *all* cases, particularly those where the defendant's role was secondary and/or where unusual mitigating circumstances exist. As Justice Scalia has noted, the "most significant role[] for judges is 'to protect the individual criminal defendant against the occasional excesses of th[e] popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of the popular will."[5]

> [T]he political system is biased in favor of more severe punishments. There are few forces that can counter the government when it overreaches on crime. As Jeremy Bentham observed, "legislators and men in general are naturally inclined" in that direction because "antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity." Bentham therefore advocated that, "It is on this side [towards severity], therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err."[6]

[5] Scalia, *The rule of law as a law of rules*, 56 U Chi L Rev 1175, 1180 (1989).

[6] Barkow, *Separation of powers and the criminal law*, 58 Stan L Rev 989, 1030-1031 (2006) (citations omitted).

This case raises the issue of whether the Legislature may require the judiciary to impose an extremely lengthy minimum term of incarceration against someone convicted as an aider and abettor and whose culpability pales next to that of the principal offender. In my view, this oversteps the boundaries that divide the executive, legislative, and judicial branches and eliminates the judiciary's fundamental role as the branch that imposes punishment on criminal defendants and which may act to moderate punishment in individual cases so as to avoid injustice.[7]

Accordingly, while I concur in affirming defendant's convictions, I respectfully dissent as to the imposition of the mandatory minimum sentence.

/s/ Douglas B. Shapiro

[7] See also Riley, *Trial by legislature: Why statutory mandatory minimum sentences violate the separation of powers doctrine*, 19 B U Pub Int'l L J (2010).